

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation Of Sections Of The Cable)
Television Consumer Protection And)
Competition Act Of 1992)
)
Rate Regulation)

MM Docket Nos. 92-266
and 93-215

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**RESPONSE OF NEWHOUSE BROADCASTING
CORPORATION TO PETITIONS FOR RECONSIDERATION**

Newhouse Broadcasting Corporation ("Newhouse"), by its attorneys, hereby submits its response to the petitions for reconsideration filed by Cox Communications, Inc. and Continental Cablevision, Inc. with respect to certain aspects of the Commission's Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking (the "Going Forward Order") in the above captioned proceeding.

DISCUSSION

One of the most contentious issues to arise in the course of implementing the rate regulation provisions of the 1992 Cable Act has been the treatment of discounted packages of *a la carte* cable services. The confusion engendered by the Commission's efforts to address this issue, which have been candidly acknowledged by the agency, need not be repeated in

detail here.¹ Suffice it to say that the Commission's most recent attempt to put the *a la carte* issue to rest has again fallen well short of the mark.

Specifically, in the Going Forward Order, the Commission (1) reversed its previously stated position and found that collective packages of *a la carte* services are subject to regulation and (2) adopted a rule (§76.986(c)(ii)) allowing collective packages of *a la carte* services containing channels migrated from regulated tiers to be treated as New Product Tiers, but only if the number of migrated channels is "small" and the package was established between April 1, 1993 and September 30, 1994. Both of these actions are seriously flawed and should be reconsidered.

First, as Cox argues in its Petition for Reconsideration, the Commission's decision to treat all *a la carte* packages as "cable programming services" subject to regulation reflects a fundamental misreading of the 1992 Cable Act. Section 623(l)(2) defines the term "cable programming services" as excluding video programming offered on a per channel basis, "regardless of service tier." 47 U.S.C. § 543(l)(2) (emphasis added). Contrary to the Commission' reinterpretation, the exemption from regulation applicable to *a la carte* video programming is not limited to services offered exclusively on a per channel basis, but also encompasses *a la carte* programming even when offered as part of a discounted service tier. Indeed, it stands logic on its head to conclude that Congress intended for otherwise

¹Newhouse itself has set forth the history of the Commission's handling of the a la carte issue in Applications for Review filed with respect to several Letter of Inquiry decisions issued by the Cable Services Bureau. See Applications for Review, Vision Cable of North Carolina, Inc. (LOI-93-24); Vision Cable (Ft. Lee, NJ), LOI-93-32; Binghamton NewChannels (LOI-93-48), Lincoln Cablevision (LOI-93-47) (filed Jan. 23, 1995). A copy of one of these Applications (without exhibits), filed on behalf of Vision Cable (Ft. Lee, New Jersey), is attached hereto.

unregulated services to become subject to regulation whenever a cable operator offers subscribers the opportunity to purchase a group of those services for less than their unregulated price.

Second, the Commission erred in limiting the circumstances in which a collective offering of migrated *a la carte* services could be treated as a New Product Tier. As noted above, Section 76.986(c)(ii) of the Commission rules states that a collective offering of migrated *a la carte* channels can be treated as a New Product Tier only if the number of channels involved is "small." The Cable Services Bureau, in a series of Letter of Inquiry rulings adopted since the release of the Going Forward Order has indicated that "small" means less than eight channels.² Yet, the record in this proceeding provides no basis whatsoever for drawing such an arbitrary line. No cable operator considering *a la carte* restructuring prior to September 1, 1993 had any reason to think that it would be engaging in an evasion of the Commission's rules if it unbundled eight channels rather than seven.

In this regard, Newhouse notes that, effective September 1, 1993, many of its affiliated cable companies unbundled between eight and twelve services. Typically, these unbundled services were divided into several distinct collective offerings, each of which had only a "small" number (four or five) services and no requirement for buying one to obtain another. Newhouse quite reasonably believed that by offering more channels on an *a la carte* basis and by offering multiple package options, it was enhancing customer choice consistent with Congressional and Commission policy. The existing rule, however, penalizes Newhouse for its actions.

²A copy of a chart analyzing the Bureau's Letter of Inquiry decisions is attached hereto.

Even if the Commission is unwilling to reconsider its decision to limit the number of channels that can be migrated to a New Product Tier, it should modify its rules to allow all operators to establish New Product Tiers with a small number of migrated services. In this regard, Newhouse supports the Cox and Continental Petitions for Reconsideration.

Operators who decided not to unbundle -- and those who decided to unbundle eight or more services -- made their decisions under the same cloud of uncertainty as operators who unbundled fewer than eight services. As a matter of equity, the same opportunity to create a New Product Tier with migrated services should be afforded to the operators who "guessed wrong." Moreover, as Cox points out, permitting operators to offer a limited number of migrated services on a New Product Tier serves the public interest by acting as an "anchor" which will make the creation of such service offerings more viable. While Cox and Continental are principally concerned with the situation faced by operators that did no unbundling in September, 1993, the relief that they seek should also be available to operators who, in the Commission's view, previously migrated "too many" services.

Finally, the Commission should refine its rules to allow cable operators to treat as New Product Tiers packages of services that were introduced prior to April 1, 1993, but that otherwise closely resemble New Product Tiers. As discussed more fully in the various Applications for Review filed by Newhouse's affiliated companies regarding the Cable Services Bureau's Letter of Inquiry decisions, Newhouse has been an industry leader in expanding its channel capacity and adding new services. Rather than simply increase the size (and price) of its heavily-penetrated basic and expanded basic tiers, Newhouse in recent years

has offered newly added services on separate and distinct tiers which were affirmatively marketed to subscribers.

For example, effective March 1, 1993, Vision Cable introduced a new, four-channel mini-tier in its Fort Lee, New Jersey system. The penetration level of this mini-tier, which was affirmatively marketed to all subscribers, was far below the levels achieved by the system's basic and expanded tiers. Three of the four services (Court TV, SciFi, and Nashville) had never been offered on the system. The fourth Channel (Sports Channel) had been offered only on a per channel basis. On September 1, 1993, Vision unbundled this mini-tier and began offering the channels individually and as a four-channel "Preferred" *a la carte* package. Vision also unbundled four other services from its basic and expanded basic tiers and began offering those services as a separate and distinct "SuperStation" *a la carte* package.

There is no question that, standing alone, either of these four-channel *a la carte* packages would qualify as a New Product Tier under the Commission's current rules. However, because a total of eight channels was involved, the Cable Services Bureau concluded that both packages had to be treated as regulated CPSTs. What makes this result particularly unjust is that, had Vision introduced the Preferred Service mini-tier in January 1995, there is no question that it would be treated as a New Product Tier.³ Yet, because Newhouse began offering its subscribers more services and more choices sooner than other

³Moreover, because only four channels would have been unbundled in September 1993, the Superstation tier also would qualify as a New Product Tier.

systems, it has lost the right to treat these services as part of a New Product Tier. The Commission can and should revise its rules to remedy this unfair result.

CONCLUSION

In light of the foregoing, Newhouse urges the Commission to reconsider its Going Forward Order insofar as it (i) holds that *a la carte* packages are subject to regulation and (ii) limits the circumstances in which *a la carte* packages containing migrated services can be treated as New Product Tiers.

Respectfully submitted,

NEWHOUSE BROADCASTING
CORPORATION

A handwritten signature in black ink, appearing to be "S.A. Davidson" followed by a long horizontal line extending to the right.

Charles S. Walsh
Seth A. Davidson

Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900

Its Attorneys

Date: February 3, 1995

EXHIBIT A

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SUMMARY

The Cable Services Bureau has held that Vision Cable Television Company knowingly evaded the Commission's rules in September 1993 when it restructured the service offerings of its Fort Lee system to create two four channel groups of *a la carte* services. The Bureau's decision treats Vision's *a la carte* packages differently than most of the *a la carte* packages the Bureau has reviewed. In every LOI decision it has issued regarding *a la carte* restructuring, the Bureau has found evidence that the *a la carte* service offerings at issue failed to give subscribers a "realistic choice" of per channel subscriptions. Yet, in most cases, the Bureau has decided that, in light of the Commission's lack of clarity in promulgating rules governing *a la carte* service offerings, it would be inequitable to treat these packages as regulated tiers on a retroactive basis; furthermore, the Bureau has designated these packages as New Product Tiers going forward.

The Bureau's decision not to accord similar equitable relief to Vision is clearly arbitrary, capricious and not in accordance with law. First, the Bureau has misconstrued certain facts and ignored others in erroneously concluding that Vision has not given its subscribers a "realistic choice" of individual channel purchases. Second, the Bureau erred in concluding that the Commission had made clear in September 1993 that the sort of restructuring effort engaged in by Vision would be deemed an evasion. The Bureau has misinterpreted and mischaracterized statements made by the Commission which were directed at "sham" *a la carte* offerings; those statements are inapplicable to Vision, which actually offers and sells each of the unbundled channels on an *a la carte* basis. Moreover, Vision's restructuring is indistinguishable from that involved in several cases where equitable relief has been granted.

The fact is that the Bureau's decision to treat Vision's *a la carte* packages as regulated tiers was based solely on the total number of channels that the system unbundled. An inspection of the LOI decisions reveals that, regardless of any other facts, equitable relief has been granted in every case in which the operator unbundled six or fewer channels and has been denied in every case in which the operator unbundled eight or more channels. This particular distinction, however, has no basis in any of the orders issued by the Commission before Vision restructured its services on September 1, 1993 (nor does it have anything to do with the "realistic choice" standard).

Under the circumstances, the Commission must reverse the Bureau's decision and fashion appropriate relief. Because Vision's *a la carte* service offerings satisfy the realistic choice test, the Commission should rescind the order directing Vision to treat its *a la carte* packages as regulated tiers back to September 1, 1993 and should recognize the unregulated status of these packages on a going forward basis. At very least, the Commission should accord Vision the same relief granted other operators with respect to *a la carte* packages created September 1, 1993. In this regard, it is noteworthy that the Preferred Service package, which was introduced as a separate mini-tier in March 1993 is indistinguishable from the kind of new product tier that the Commission is seeking to promote. Had Vision introduced this package in January 1995, there would be no question that it would be an NPT. It makes no sense to penalize Vision for giving its subscribers more services and more choices sooner than other systems.

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of:)
)
Vision Cable Television Company) LOI-93-32
Fort Lee, New Jersey)
)
Letter of Inquiry)

APPLICATION FOR REVIEW

Vision Cable Television Company ("Vision"), operator of a cable system serving Fort Lee, New Jersey, hereby submits an Application for Review of the Memorandum Opinion and Order, DA 94-1554 (rel. Dec. 22, 1994) (hereinafter "LOI Order"), issued by the Chief, Cable Services Bureau, in the above-captioned Letter of Inquiry proceeding.

I. BACKGROUND.

A. The April 1993 Report And Order.

On April 1, 1993, the Commission adopted its initial Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993) ("Report and Order"), implementing the rate regulation provisions of the 1992 Cable Act. The Report and Order established rules governing the regulation of the rates charged for the basic service tier and related equipment and for tiers of "cable programming services." The Report and Order also addressed the status of per-channel or "*a la carte*" service offerings.

With respect to per channel services, the Report and Order specifically acknowledged that, under the 1992 Cable Act, services offered on an *a la carte* basis are not subject to rate

regulation. Id. at ¶ 4.¹ Moreover, echoing Congressional findings encouraging cable operators to "unbundle" services,² the Commission concluded that the movement of programming from a regulated tier to unregulated status does not "pose[] a significant issue under the regulatory framework of the Act," adding that "[w]e do not believe that anything in this Act requires us to restrict movement of a channel to premium and deregulated status." Id. at n.1105.

The initial Report and Order also addressed the practice of offering customers the option of purchasing per channel services in discounted collective packages, finding that "such discounts benefit the consumer" and that discouraging such arrangements through regulation "would not serve the purposes of the Cable Act" and "might be counterproductive." Id. at ¶¶ 327-29. Thus, the Commission acknowledged that the statutory exemption from rate regulation for per channel services also covered discounted collective offerings of such services. Id.

However, the Commission evidenced concern that regulation could be evaded if operators unrealistically priced the collective packages relative to per channel prices;

¹See also 47 U.S.C. § 543(l)(1).

²The legislative history of the Act indicates that the decision to exempt services offered on a per channel basis from rate regulation reflects Congress' belief that "greater unbundling of offerings leads to more subscriber choice and greater competition among program services." S. Rep. No. 92, 102d Cong., 1st Sess. 77 (1991) ("Senate Report"). See also H. Rep. No. 628, 102d Cong., 2d Sess. 90 (1992). According to Congress, unbundling also gives subscribers "greater assurance that they are choosing only those program services that they wish to see and not paying for programs they do not desire." Senate Report at 77. See also Report and Order, supra at ¶ 327; id. at ¶ 453, n.1161 (recognizing that unbundling gives consumers "the ability to choose or veto such programming on an individual channel . . . basis").

consequently, the Commission articulated a two-part test for analyzing the bona fide status of collective offerings of *a la carte* services. First, the Commission held that the price of the package must not be greater than the sum of its individually-priced components. *Id.* at ¶ 327. Second, the Commission required that each service in the package actually be available for separate purchase. *Id.* at ¶ 328. With regard to this latter test, the Commission made clear that operators could not escape regulation by offering the services at a per channel rate that made individual channel purchases an unrealistic option. *Id.* at n.808. The Commission also indicated that an operator was required to do more than "simply" announce the availability of tiered services on a per channel basis or to "simply replicat[e] its existing service structure through the rebundling of *a la carte* services into packages of services" and that an operator actually had to "offer these services *a la carte*." *Id.* at notes 808, 809.

B. Vision's Implementation Of Its A La Carte Service Options.

Following the release of the April 1993 Report and Order, Vision proceeded with plans to restructure its service offerings to bring its operations into compliance with the rate rules. On August 27, 1993, only days before the September 1, 1993 effective date of rate regulation,³ the Commission released its First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd

³The April 1993 Report and Order established June 21, 1993 as the effective date for the new rate rules. In June, the Commission extended this deadline until October 1, 1993. Order, MM Docket No. 92-266, 58 Fed. Reg. 33560 (June 18, 1993). However, in late July, the Commission moved the effective date back up to September 1, 1993. Order, MM Docket No. 92-266, 53 Fed. Reg. 41042 (Aug. 2, 1993).

1164 (1993) ("First Recon. Order"). In that decision, the Commission confirmed that "restructuring program offerings to provide more *a la carte* services is not per se undesirable" and found that any incentive to avoid regulation by unbundling services now offered on tiers "is created by the statute itself." Id. at ¶ 35. The Commission also reaffirmed that cable operators could engage in revenue-neutral tier restructuring (including the division of existing tiers) without affirmatively marketing the restructured service offerings. Id. at n.127.⁴

Relying on both the April 1993 Report and Order and the First Recon. Order, as well as on discussions with Commission staff, Vision implemented its rate and service restructuring effective September 1, 1993. Prior to September 1, 1993, Vision had offered its subscribers 42 non-premium services in three distinct packages: a 16 channel "Broadcast Basic" tier; a 22 channel expanded basic "Cable Service" tier; and an optional 4 channel mini-tier (known as the "Preferred Service" tier).⁵ Effective September 1, 1993, Vision "unbundled" two of the Broadcast Basic channels (WTBS and WSBK) and two of the Cable Service tier channels (TNT and Discovery) and began offering them as individually-priced *a la carte* channels (\$0.75 each) and as a discounted 4-channel *a la carte* "SuperStation" package (priced at \$2.00).⁶ Vision separately unbundled the four channels in the Preferred

⁴See also Report and Order, supra at ¶ 441; 47 C.F.R. § 76.981.

⁵The LOI Order indicates that Vision was offering a 15 channel Broadcast Basic (and 41 non-premium services). Vision added the 16th channel after the publication of the channel line-up attached to its reply to the LOI, but prior to its September 1, 1993 restructuring.

⁶On December 31, 1993, Vision replaced WSBK with ESPN2, a service not previously offered on the system.

Service mini-tier (SportsChannel, Nashville, Court TV, and SciFi), offering them as individual *a la carte* channels and as a second, distinct "Preferred Service" *a la carte* package.⁷ Subscribers could choose any or all of the channels in the SuperStation or the Preferred Service packages without having to purchase any or all of the other services in those packages.

In restructuring its services, Vision's principal goal was to maximize subscriber choice and reduce the unintended consequences of regulation. For example, as a result of the Commission's "tier-neutral" rate scheme, Vision was left with little choice but to dramatically increase its Broadcast Basic tier rate (priced at \$1.00 prior to September 1, 1993). To minimize the impact of this increase on basic-only subscribers, and to give all subscribers more choice, Vision chose to unbundle several channels from the Broadcast Basic tier. Similarly, Vision could have decided, as part of its restructuring, to "melt down" the Preferred Service mini-tier into the Broadcast Basic and/or Cable Service tiers, effectively forcing additional channels on customers to those levels of service. The Preferred Service tier had been introduced on the system (and affirmatively marketed to subscribers) only six months earlier, on March 1, 1993,⁸ and had achieved a penetration level (60 percent) far below that achieved by the Broadcast Basic tier (100 percent) and Cable Service tier (99

⁷A fifth channel, BET, was added to the system as a Preferred Service *a la carte* channel on January 10, 1994. Each Preferred Service channel is priced at \$1.25 per channel, except for SportsChannel, which is \$2.00. The 5-channel Preferred Service *a la carte* package may be purchased for \$4.00.

⁸SportsChannel had been offered on the system on a per channel basis prior to the introduction of the Preferred Service tier. The other Preferred Service channels were new to the system in March 1993.

percent). Instead, Vision unbundled the Preferred Service channels, establishing a pricing structure that allowed subscribers to select individual channels and achieve significant savings vis-a-vis the collective package options.⁹

C. The Commission's Letter Of Inquiry.

On December 13, 1993, the Commission issued a Letter of Inquiry (LOI-93-32) seeking information regarding Vision's new service structure, including an explanation of why *a la carte* channel purchases represent a realistic service offering in comparison to the collective package options.¹⁰ The LOI was issued in response to a Form 329 Complaint submitted to the Commission regarding Vision's rates for its CPS tier. This complaint did not expressly or implicitly raise any objections to Vision's restructuring.¹¹

Vision submitted its reply to the LOI on January 12, 1994.¹² In its reply, Vision described its new service structure and explained how it was designed to comply with the 1992 Cable Act and the Commission's implementing regulations. In particular, Vision discussed how its new service structure addressed the desire of many customers for increased

⁹Vision also took steps to ensure that subscribers were fully aware of their new service options. See Appendix C.

¹⁰Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Vision Cable, LOI-93-32 (Dec. 13, 1993) (copy attached hereto as Appendix A).

¹¹A copy of the complaint referenced in the LOI is attached as Appendix B. Out of more than 45,000 subscribers, Vision received only 4 Form 329 complaints after it restructured its rates and services on September 1, 1993; none of the complaints attacked the introduction of *a la carte* service options.

¹²Letter from Edward E. Rose, General Manager, Vision Cable Television Co., Inc., to Roy J. Stewart, Chief, Mass Media Bureau, FCC, LOI-93-32 (Jan. 12, 1994) (copy attached hereto as Appendix C).

choice. Vision specifically noted that many subscribers had chosen not to subscribe to the Preferred Service channels (introduced the previous March) when they were available only as part of a tier and that unbundling those channels had given subscribers the opportunity to select individual services at a significant savings over the former package price.¹³

D. The Second Order On Reconsideration.

On March 31, 1994, a year after adopting its April 1993 Report and Order -- and seven months after Vision implemented its rate and service restructuring -- the Commission reaffirmed that collective offerings of *a la carte* channels were exempt from rate regulation, so as to "afford[] operators an opportunity to enhance consumer choice by making programming more affordable and more widely available." Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd 4119 (1994) ("Second Recon. Order") at ¶ 194. The Commission, however, also reiterated concerns that, in some cases, restructured service offerings might constitute an evasion and/or not satisfy the realistic option test. Id. at ¶ 193. Consequently, the Commission announced fifteen "interpretive guidelines" for use in "expeditiously" determining whether an operator's collective offering of *a la carte* channels should be deemed an evasion and/or an unrealistic service offering. Id. at ¶¶ 195-96. On their face, many of these guidelines had nothing to do with the realistic option test set forth in the Commission's April 1993 Report and Order. In addition, the Commission did not

¹³Prior to September 1, 1993, the four-channel Preferred Service mini-tier was priced at \$4.40. As noted above, after unbundling, these channels were available for \$1.25 apiece (or \$2.00, in the case of SportsChannel).

specify how the 15 factors were to be weighed; the Commission did say, however, that no single factor would be dispositive and that the analysis would focus on whether the offering enhances consumer choice or, intentionally or in effect, constitutes an evasion. *Id.* at ¶ 196.

E. The Going Forward Order And Letter Of Inquiry Decisions.

Following the release of the Second Recon. Order, it quickly became apparent that the Commission was having difficulty applying its own test for assessing *a la carte* service offerings.¹⁴ Yet, even as confusion regarding the assessment of *a la carte* packages mounted, franchising authorities were beginning to make their own determinations concerning the status of the *a la carte* packages established by Vision and its sister companies. These determinations included a decision by the State of New Jersey Board of Public Utilities ("NJBPUP") upholding Vision's *a la carte* service offerings in Fort Lee.¹⁵ The NJBPUP, after reviewing the *a la carte* service offerings in detail, expressly found that Vision had complied with the Cable Act and the Commission's rules by restructuring its service offerings in a way that increased choice and did not force subscribers to purchase packages rather than individual channels. Consequently, the NJBPUP held that the SuperStation and Preferred Service *a la carte* service offerings were entitled to treatment as unregulated channels.¹⁶

¹⁴See "FCC to Cable: Sit Tight On *A La Carte*," Cable World, July 4, 1994, at page 1 (indicating that Cable Services Bureau "is having difficulty developing consistent policy on *a la carte* offerings").

¹⁵See Appendix D attached hereto.

¹⁶Id. A similar conclusion was reached by the local franchising authority with respect to
(continued...)

Finally, on November 18, 1994 -- more than a year and a half after adopting its initial Report and Order (and more than 14 months after Vision restructured its rates and services) -- the Commission revisited the regulatory status of collective offerings of *a la carte* services as part of its Sixth Order on Reconsideration, Fifth Report and Order and Seventh Notice of Proposed Rulemaking, MM Docket No. 92-266 (rel. Nov. 18, 1994) ("Going Forward Order"). Acknowledging that its tests for assessing *a la carte* packages had failed to provide clear guidance, the Commission reversed outright its original decision to treat *a la carte* packages as exempt from rate regulation. According to the Commission's revised interpretation of the Cable Act, all packages of individual channel offerings of video programming are "cable programming service tiers" subject to federal regulatory oversight. Id. at ¶ 46. While designating all packages as regulated tiers, the Commission adopted rules under which certain types of packages could be deemed "New Product Tiers" (or "NPTs"). NPT rates are presumed reasonable and NPT channels are not treated as "regulated" channels in calculating a system's basic and regulated CPS tier rates. Id. at ¶¶ 22-37.

Coincident with the release of the Going Forward Order, the Cable Services Bureau began issuing Letter of Inquiry decisions regarding collective offerings of *a la carte* packages. The Bureau has now issued more than 40 LOI decisions, including (on December

¹⁶(...continued)

9 channel *a la carte* service structure established by Vision Cable of Houma, Louisiana. See Appendix E. In several other communities served by Vision or its sister companies, franchising authorities have approved the Form 393 rate justification without discussion of the *a la carte* issue. To date, no franchising authority has issued a final ruling determining that an *a la carte* service offering established by Vision or its sister companies should be treated as a regulated tier.

22, 1994) the LOI Order at issue here.¹⁷ In every one of these decisions, the Bureau has found evidence that individual channel purchases were not a realistic service option and that the restructuring in question had the effect of evading rate regulation. In the vast majority of cases, however, the Bureau has concluded that, given the confusion surrounding the Commission's test for analyzing *a la carte* packages, it would be inequitable to treat the service offerings at issue as rate-regulated channels; instead, the Bureau has relieved these cable operators of any retroactive liability and designated the package an NPT on a going-forward basis. Only in a few of the cases -- including the case at issue here -- has the Bureau ordered that *a la carte* service offerings created prior to September 1, 1993 be treated as regulated CPS tiers, both prospectively and retroactively.

II. ARGUMENT.

A. The Bureau Erred In Concluding That Vision's *A La Carte* Restructuring Did Not Provide Consumers With A Realistic Service Choice.

The LOI Order expressly recognized that, in order for the Bureau to find Vision guilty of evading the Commission's rules, there first had to be a determination that the *a la carte* structure at issue did not meet the requirements for permissible collective offerings under the regulations in effect on September 1, 1993 (the date Vision restructured).¹⁸ In other words, the Bureau had to find that the purchase of individual SuperStation or Preferred

¹⁷On December 15, 1994, a week before the release of the LOI Order, Vision submitted to the Commission a supplemental LOI response, clarifying its initial response in light of the LOI decisions issued to that date. See Attachment F hereto. The LOI Order makes no mention of Vision's supplemental response, or gives any indication that consideration was given to any of the information provided therein.

¹⁸LOI Order at note 20.

Service channels was not a "realistic option." While the Bureau so found, its decision was plainly arbitrary and capricious.

Specifically, without clearly distinguishing between Vision's two separate collective offerings of *a la carte* channels, the Bureau concluded that per channel purchases did not constitute a realistic choice for the system's subscribers because: (1) "few subscribers" actually subscribed to individual channels; (2) Vision eliminated "an entire regulated tier" and turned it into an *a la carte* package"; (3) a "significant percentage" (89 percent) of the channels in the two *a la carte* packages were removed from regulated tiers; and (4) as a result of its restructuring, Vision's rates did not have to be reduced to the extent that allegedly would otherwise have been the case. LOI Order at ¶¶ 13-15, 19-20.¹⁹ With respect to each of these "factual" findings, the Bureau's analysis cannot withstand scrutiny.

First, by the Bureau's own admission, several hundred subscribers had elected to purchase SuperStation and/or Preferred Service channels on a per channel basis as of January 12, 1994. This fact clearly indicates that per channel subscriptions are a realistic option; certainly there is no evidence that those subscribers electing the per channel option are behaving irrationally. Moreover, while it is highly relevant that some customers are actually choosing to take individual services rather than the package, the Bureau's decision to effectively require some particular, yet unspecified, level of per channel penetration to satisfy

¹⁹The Bureau also relied on its findings that Vision's restructuring occurred on "the eve of regulation"; that all of the channels in the package were removed from a tier; and that Vision allegedly "automatically subscribed" customers to its *a la carte* package. Id. at ¶ 15.

the realistic option test is legally unsustainable.²⁰ In addition, Vision's experience has been that subscribership for new service offerings grows over time; evaluating whether the purchase of individual channels from either the SuperStation or Preferred packages represents a realistic choice on the basis of the penetration achieved only a few months after the *a la carte* option was introduced is both misleading and arbitrary.²¹

Second, neither the fact that Vision completely unbundled in its 4-channel Preferred Service tier (which had been introduced as an entirely new service option only a few months earlier), nor the fact that eight of the system's nine *a la carte* services previously were offered only as parts of tiers has anything to do with whether the individual purchase of these channels represents a realistic service option. In fact, by offering nine *a la carte* channels in two distinct packages, Vision maximized choice for its subscribers.²² In any event, the Bureau's analysis runs afoul of Section 625(d) of the Communications Act, 47 U.S.C. § 545(d), which provides that "a cable operator may take such actions to rearrange a

²⁰The Bureau's reliance on this undisclosed penetration test is particularly suspect given that the Bureau has taken the position that even where, only a few months after restructuring, as many as 23 percent of a system's subscribers have restructuring, elected individual channel purchases over the package, a realistic choice still does not exist. Century Cable TV (Muncie, IN), LOI-93-18, DA 94-1354 (rel. Dec. 2, 1994) at ¶ 17.

²¹In fact, the number of individual SuperStation or Preferred Service channel subscriptions has grown more than 42 percent since December 31, 1993.

²²Vision notes that the Commission did not even indicate that unbundling an entire tier was a concern until the Second Recon. Order was released in March 1994 and, thus, this factor is not properly taken into consideration in analyzing Vision's *a la carte* service offerings under the rules in effect on September 1, 1993. Similarly, the fact that all of the services on the *a la carte* service offerings previously had been available only as part of a tier does not implicate the actual availability of the services for individual purchase and, in any event, was not disclosed as a relevant factor until the Second Recon. Order was issued.

particular service from one service tier to another, or otherwise offer the service, if the rates for all of the service tiers involved in such actions are not subject to regulation under Section 623.²³ As the Commission itself has recognized, Section 625(d) "explicitly and narrowly proscribes" the ability of both the Commission and of franchising authorities "to interfere in decisions by cable companies regarding unregulated tiers of service, which would include all tiers prior to institution of regulation."²⁴ The Commission also has recognized that Congress did not revise Section 625(d) as part of the 1992 Cable Act. First Recon. Order, supra at ¶¶ 85-86. Thus, because rate regulation could not have been "instituted" with respect to Vision's CPS tiers until (1) after September 1, 1993 and (2) after a Form 329 complaint was filed, Vision's decision to "otherwise offer" certain of the channels formerly carried on these tiers was fully protected by Section 625(d).²⁵

²³47 U.S.C. § 545(d) (emphasis added).

²⁴Report and Order and Second Further Notice of Proposed Rulemaking, MM Docket No. 90-4, 69 RR 2d 671, 691 (1991). The Commission has determined that even though "retiering in anticipation of regulation" could affect the number of services subject to regulation, "the Cable Act clearly prevents any action restricting such behavior." Id.

²⁵The Commission separately has pointed out that, under Section 625(d), cable operators are free to move services from one tier to another, even if the tiers are rate regulated, so long as the franchise agreement does not specifically require that the services be carried on a particular tier. Id. at n.111. Thus, even if the restructuring of the satellite tier occurred after the date on which regulation of that tier was "instituted," the fact that Vision's franchise does not mandate carriage of the services at issue means that, under Section 625(d), Vision was free to move those channels to unregulated status without any "interference" from the Commission.

In light of Section 625(d), it also is irrelevant that Vision introduced its *a la carte* service offerings on "the eve of regulation." Furthermore, at the time Vision restructured its rates and service offerings, the Commission not only had clearly indicated that restructuring at any time prior to the September 1, 1993 rate regulation effective date was permissible, but

(continued...)

Third, the Bureau's claim that Vision's permitted rates might be higher as a result of its restructuring than otherwise would have been the case ignores the fact that Vision's rates already were lower than average and, in any event, has nothing to do with whether Vision's per channel offerings represent a realistic service offering. As the Commission itself acknowledged in its First Recon. Order, the incentive to minimize the impact of rate regulation by moving services from regulated tiers to *a la carte* is inherent in the statute. Id. at ¶ 35. Furthermore, the impact on rates of permissible restructuring was never raised as a factor to be considered in analyzing *a la carte* packages until the Second Recon. Order and, thus, should not have been considered by the Bureau.²⁶

The above discussion plainly establishes that the Bureau's factual analysis cannot sustain the conclusion that Vision failed to offer its subscribers a realistic service choice with

²⁵(...continued)

also had facilitated such changes by waiving and preempting notice requirements that might have interfered with restructuring efforts. See, e.g., Order, MM Docket No. 92-266, 8 FCC Rcd 3652 (1993).

²⁶Similarly, the Bureau's finding that Vision "automatically subscribed" customers to its *a la carte* packages also should have had no bearing on the realistic option issue. The Bureau ignored the fact that Vision has required anyone becoming a subscriber after September 1, 1993 to affirmatively elect which individual services and/or packages they wish to receive. Moreover, the manner in which Vision proceeded with respect to its existing subscribers on September 1, 1993 was designed to ensure that those subscribers continued to receive the channels which they had previously ordered and, in many cases, for which they had already paid. Indeed, Vision had little choice but to proceed in this manner given the Commission's last minute decision to move up the implementation deadline under its rate rules from October 1, 1993 to September 1, 1993. Lastly, Vision's effort to avoid service disruptions that might otherwise have resulted was consistent with the Commission's own rules, which provide that a revenue-neutral restructuring or division of existing tiers does not require affirmative remarketing. First Recon. Order, supra at n.127 (expressly reaffirming that "cable operators may engage in revenue neutral restructuring without violating the negative option billing procedure").